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No. 86-1207

In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

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TABLE OF AUTHORITIES

Cases:	Page
Amanullah v. *Nelson*, 811 F.2d 1 (1st Cir. 1987)	6
Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 1984)	7
Constitution, statutes and regulations:	
U.S. Const. Amend. V (Due Process Clause)	3
Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359:	
§ 101:	
§ 274A (i) (1) (B), 100 Stat. 3368-3369	7
§ 274A (i) (2), 100 Stat. 3369	7
8 U.S.C. 1103	6
8 U.S.C. 1182 (a) (14)	5
8 U.S.C. 1252 (a)	6
8 C.F.R.:	
Section 103.6 (a) (2)	1, 2, 3, 4
Pt. 109	2, 3, 4-5
Pt. 274a, Subpt. B	2
Miscellaneous:	
52 Fed. Reg. (Mar. 19, 1987):	
pp. 8740-8795	3
p. 8763	2
pp. 8766-8767	2
p. 8767	3
H.R. Rep. 1192, 81st Cong., 1st Sess. (1949)	6
H.R. Rep. 99-682, 99th Cong., 2d Sess. Pt. 1 (1986)	5, 6, 7
S. Rep. 2239, 81st Cong., 2d Sess. (1950)	6
S. Rep. 99-132, 99th Cong., 1st Sess. (1985)	5

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The permanent, nationwide injunction entered by the district court in this case, and affirmed by the court of appeals, was based entirely and exclusively on the holdings of those courts that 8 C.F.R. 103.6 (a)(2), as promulgated by the Immigration and Naturalization Service (INS) in 1983, is beyond the statutory authority of the Attorney General. It is on that issue of statutory interpretation that we have petitioned for certiorari.

Respondents make no serious attempt to defend the statutory interpretation adopted by the court of appeals.[1] Instead, they offer various reasons why (they

[1] Respondents' only discussion of the merits of the statutory question (Br. in Opp. 14-17) eschews entirely the reasoning of the courts below and relies instead on a fundamental mis-

assert) the Court should not examine the issue. Respondents' desire to avoid having this Court look at the merits of the statutory question is understandable, given that its resolution by the courts below was erroneous when rendered and since then—according to respondents themselves (Br. in Opp. 1-2)—has been undercut a great deal more by the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. But, in seeking to achieve that end, respondents do much to obfuscate and little to clarify the issue.

First, respondents state that "the agency contemplates significant changes in the employment authorization regulations as a result of the 'employer sanctions' provisions of the new immigration law" (Br. in Opp. 1). That statement is factually erroneous. Section 103.6(a)(2), the regulation that the courts below invalidated, has not been changed, no proposal to change it has been circulated or published, and INS has no plans to change it. Related regulations found in Part 109 of 8 C.F.R. have been proposed to be transferred—*without change*—to Subpart B of a new Part 274a of 8 C.F.R. See 52 Fed. Reg. 8763, 8766-8767 (Mar. 19, 1987).[2] There are no "super-

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characterization of the challenged regulation. What that regulation does is to condition release of an arrestee on his or her agreement not to break the law by engaging in unauthorized employment (see Pet. 2-5, 17, 21 n.13, 25 n.14). The regulation that respondents attack in their discussion of the merits—one that sanctions incarceration without bail—simply is not the regulation at issue.

[2] In the brief in opposition at 10 n.11, respondents make certain representations about proposed changes to Part 109, based on a preliminary working draft of regulations circulated informally by INS shortly after enactment of the IRCA. That preliminary working draft was superseded by draft

ceded [*sic*] regulations" or "unknown future regulations" (Br. in Opp. 10) at issue in this case.

Second, respondents state that "[t]he courts below ruled in part as they did because the challenged work authorization procedures failed to provide persons facing detention solely because of their need to work a due process hearing" (Br. in Opp. 1; see also *id.* at 10). That statement misrepresents the basis of the permanent injunction at issue. Although the district court stated at the preliminary injunction stage that respondents had a "fair chance" of prevailing on their theory that 8 C.F.R. 103.6(a)(2) was inadequate to satisfy the Due Process Clause (Pet. App. 47a-48a), the court of appeals did not reach that issue in affirming the preliminary injunction (*id.* at 38a n.2), and neither the district court nor the court of appeals reached that issue in ruling on the permanent injunction (see *id.* at 4a, 13a-14a).[3]

Third, respondents err in stating that "the holdings of both courts [below] rest on factual findings

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regulations made publicly available on March 5 and published in the *Federal Register* on March 19 (52 Fed. Reg. 8740-8795). The published draft regulations are contrary in every respect to respondents' representations in footnote 11. See *id.* at 8767. Moreover, neither the preliminary working draft nor the published draft regulations propose any change to Section 103.6(a)(2).

[3] Respondents' due process argument (Br. in Opp. 12-13), moreover, is wholly without merit. The issue to be resolved in deciding whether to impose a bond condition is not whether the arrestee is deportable. Rather, the district director determines only whether the arrestee is authorized to work—an extremely simple matter (see Pet. 17 & n.12)—and, if not, whether, under Part 109, the arrestee should be relieved (pending deportation proceedings) from his preexisting legal obligation *not* to work.

concerning petitioners' approach to bond conditions barring employment" (Br. in Opp. 2). The permanent injunction was entered by the district court pursuant to a grant of summary judgment to respondents (Pet. App. 12a), and the court made no factual findings. The district court's statement that the challenged regulation imposes "a blanket [bond] condition which inherently precludes any individualized determination" (*id.* at 15a) is not, as respondents claim (Br. in Opp. 3), a factual finding but a conclusion of law—and, as we showed in our petition (at 8-9, 17-18, 25), an incorrect one. Nor did the district court "find" that "delays before administrative review of 'no-work' bond conditions often extended 'several weeks' " (Br. in Opp. 3 (quoting Pet. App. 47a-48a)). Rather, the district court observed at the preliminary injunction stage that "[e]vidence presented indicates" that such delays took place under the cumbersome procedure in effect before 1983 (Pet. App. 47a-48a)—a procedure that the challenged regulation abolished.

Fourth, respondents again err in stating that in 1983 INS "began admitting all arrested persons to bail only upon condition they not work" (Br. in Opp. 5). INS never began implementation of 8 C.F.R. 103.6(a)(2), because its implementation was enjoined in this lawsuit at the same time it would have taken effect. And Section 103.6(a)(2) does not "admit[] all arrested persons to bail only upon condition they not work." Rather, it conditions the bail of arrested persons on their not engaging in *unauthorized* employment. Those arrestees who can show that they are citizens, or that they are bona fide applicants for asylum, or that they have preexisting work authorization, or that they meet the terms of 8

C.F.R. Pt. 109 authorizing district directors to grant work authorization, are not forbidden to work by any condition of their bonds. See Pet. 8-9, 17-18, 25.

Fifth, respondents contend that "[a]ny contribution bond conditions may have made [[to controlling unauthorized employment]—and the question petitioners propose—is now of little importance" (Br. in Opp. 8-9 (footnote omitted)). We disagree.

Contrary to respondents' assertion (Br. in Opp. 2), the IRCA—the 1986 Act—was not the first congressional manifestation of more than a "peripheral concern" with unauthorized alien employment. The Act has always prohibited unauthorized employment by undocumented aliens (8 U.S.C. 1182(a)(14)). Until the IRCA, however, the available means for enforcing that prohibition worked solely against the alien and solely by means of deportation. The challenged regulation was an effort on the part of INS to enhance its enforcement capability by adding a further disincentive for aliens to engage in unauthorized employment.

Concerned that the enforcement efforts of the unauthorized-employment prohibition were not effectively stemming the tide of illegal immigration, Congress added another dimension of enforcement ability in the IRCA by providing sanctions against employers. The legislative history of the IRCA reflects Congress's belief that "most undocumented aliens enter this country to find jobs" (H.R. Rep. 99-682, 99th Cong., 2d Sess. Pt. 1, 47 (1986)), and its longstanding concern with controlling illegal immigration by reducing employment incentives (*id.* at 52, 56, 104-105, 109). See also S. Rep. 99-132, 99th Cong., 1st Sess. 1, 8 (1985). Moreover, despite respondents' attempt to disparage the adverse impact

of unauthorized alien employment on the domestic work force (Br. in Opp. 6 n.5, 9 n.10), the legislative history reflects Congress's continuing belief that such an adverse impact exists. See H.R. Rep. 99-682, *supra*, at 47 (expressing particular concern with unemployment among "minority groups with whom undocumented workers compete for jobs most directly"); *id.* at 52, 53.

The availability of employer sanctions as an additional enforcement technique does not undermine the importance of the underlying question in this case, namely the scope of the Attorney General's discretion in devising other techniques to enforce statutory prohibitions on unauthorized alien employment.[4] Rather, the employer sanction provisions emphasize once again that Congress has long been concerned with alien employment and show that the concern remains so strong that Congress chose to enact additional methods for enforcing the statute's employment pro-

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[4] There is no basis for respondents' contention (Br. in Opp. 9 n.10) that through the IRCA Congress "[c]oncurr[ed]" in the decisions below, which are not discussed in the legislative history of the IRCA. There was no need for Congress to include specific bond conditions in the IRCA since the Immigration and Nationality Act already contained a bond provision (8 U.S.C. 1252(a)) that Congress, in its own words, understood to give the Attorney General "untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond * * * pending final determination of the deportability of the alien" (H.R. Rep. 1192, 81st Cong., 1st Sess. 6 (1949); S. Rep. 2239, 81st Cong., 2d Sess. 5 (1950)), and a general provision (8 U.S.C. 1103) from which, as the First Circuit recently observed, "it is readily apparent that Congress has invested the Attorney General with vast discretion anent immigration matters" (*Amanullah* v. *Nelson*, 811 F.2d 1, 5 (1987)).

hibitions without in any way repealing the federal enforcement methods already in existence.[5]

Nor is there reason to believe that employer sanctions are a complete answer to the problem of unauthorized employment, making all other enforcement mechanisms superfluous. The employer sanctions will not even become fully operational until the IRCA has been in effect for 18 months (see IRCA § 101 (adding Immigration and Nationality Act § 274A(i)(1)(B), (i)(2)), 100 Stat. 3368-3369 (to be codified at 8 U.SC. 1324A)), and at present one can only speculate as to how efficacious they will be. In any event, the existence of employer sanctions will not make no-unauthorized-work bond conditions superfluous, any more than the existence of the criminal code makes it superfluous to include provisions forbidding violations of the criminal law in the release bonds of persons arrested for criminal offenses (see Pet. 21 n.13). The IRCA provides no reason to deny review in this case.[6]

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[5] Respondents have misconstrued the intent of Congress in preserving certain labor protections for alien workers (Br. in Opp. 16-17). As we explained in the petition (at 27-29), applying labor protections to undocumented employees serves as a disincentive for employers to hire such workers with the concomitant expectation that the demand for such workers will decrease and ultimately the flow of illegal immigration will decline. Indeed, in H.R. Rep. 99-682, *supra*, at 58, Congress specifically endorsed the rationale of *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 893 (1984), as discussed in the petition (at 15-16 and 29). Moreover, in preempting state laws concerning regulation of alien employment (see Pet. 28-29 n.18), Congress expressed no intention to repeal existing federal law, including the INS regulation at issue here.

[6] Contrary to respondents' assertion (Br. in Opp. 2), it is extremely likely that the courts below would adhere to their prior rulings if asked to rule again on the issue in light of the

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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IRCA, since both courts expressly (and incorrectly) held that the *only* permissible bond conditions are those related to ensuring appearance at deportation proceedings (Pet. App. 7a, 18a-19a, 22a-23a). Review by this Court is therefore appropriate at this time. Moreover, if respondents were correct in suggesting that the basis for the judgment below has been undercut by the IRCA, the appropriate course would be to vacate the judgment below rather than to deny certiorari.

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